Magnolia Manor Nursing Home, Inc. *and* **Service Employees International Union, Local 706, AFL-CIO.** Cases 16-CA-9119 and 16-CA-9185

February 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 18, 1980, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding and, on December 29, 1980, he issued an erratum to that Decision. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Magnolia Manor Nursing Home, Inc., Jefferson, Texas, it officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer the employees listed in Appendix A immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered due to the discrimination practiced against them, plus interest."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent further claims that the Administrative Law Judge took "the position of advocate" at the hearing and was not neutral or impartial. It also contends that the Administrative Law Judge used "prejudicial and wrong reasoning to make adverse findings against Respondent." We have carefully examined the record and the Decision in light of these claims and find no basis for them.

In the absence of exceptions, we adopt *pro forma* the Administrative Law Judge's findings that Respondent did not violate the Act with respect to the discharge of Johnetta Johnson, and the ensuing quits of Lillie Crowe, Acie Tucker, and Della Washington.

[2] The Administrative Law Judge found that Respondent had violated Sec. 8(a)(3) of the Act by refusing to hire and by the actual or constructive discharges of a number of the alleged discriminatees. In finding these violations, the Administrative Law Judge did not specifically find that Respondent was aware of the particular union activities of each discriminatee before it took adverse action against each. In the circumstances of this case, we do not deem such a finding necessary. As the Administrative Law Judge found, all the employees were union members and supporters. Also, the Administrative Law Judge found, Respondent desired a turnover of the staff it initially hired as it considered that staff prounion and it wished to dissipate the strength of that prounion sentiment. Numerous of its actions detailed by the Administrative Law Judge were taken with the object in mind of dissipating the Union's strength. And it is clear that the various adverse actions taken against the discriminatees were part of the pattern of reducing support for the Union by removing its supporters. Given these circumstances, we conclude that it was not necessary for the Administrative Law Judge to detail at length either the union activity of any particular employee who was the victim of Respondent's adverse action or Respondent's knowledge of a discriminatee's personal involvement in union activity. Cf. *Karl Kallmann d/b/a Love's Barbeque Restaurant No. 62, Love's Enterprises, Inc.*, 245 NLRB 78, 81 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981); *Houston Distribution Services, Inc.*, 227 NLRB 960, 967 (1977). In addition, we find that Karen McAllister was discharged on May 6, 1980, as the Administrative Law Judge found at fn. 9 of his Decision, rather than on May 3, 1980, as he indicated at sec. 3(h) of his Decision. We also agree with the Administrative Law Judge's conclusion that McAllister's discharge was part of Respondent's unlawful plan to dissipate support for the Union and therefore violated Sec. 8(a)(3) of the Act. In so concluding, however, we agree with the Administrative Law Judge's recitation of the facts as set out at fn. 9 of his Decision.

Member Zimmerman specifically disavows the Administrative Law Judge's conclusion that the discharge of Mary Banks would have been violative of the Act even if she were found to be a supervisor. He adopts the finding of violation in connection with Bank's discharge only because, in agreement with the Administrative Law Judge, he finds her to be an employee.

[3] We have modified the Administrative Law Judge's recommended Order to include the full reinstatement language traditionally provided by the Board. We also modify the proposed notice to conform with the provisions of the recommended Order.

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail to recognize and bargain with the Union on all matters relating to the terms and conditions of employment, or any changes thereto, and with respect to reaching

agreement on a collective-bargaining agreement.

WE WILL NOT discharge or fail to retain employees for the purpose of undermining support for the Union.

WE WILL NOT coercively interrogate employees with regard to their own union activities, the union activities of fellow employees, the activities of the Union, or the identities of union activists.

WE WILL NOT engage in surveillance or give the impression of engaging in surveillance of union activities.

WE WILL NOT make coercive statements to employees designed to undermine support for the Union such as our willingness to pay a large fine before recognizing the Union or by threatening to discharge 50 percent or more of union supporters, or by stating we will never bargain with the Union over wages or other terms and conditions of employment.

WE WILL NOT make erroneous statements of labor law to employees such as stating that because there is no contract, there is no union.

WE WILL NOT offer benefits to employees such as payment of insurance premiums for the purpose of undermining support for the Union.

WE WILL NOT coercively tell employees that a legitimate reason for discharge could always be fabricated and make other similar types of antiunion statements.

WE WILL NOT tell employees that other employers in the area had been calling and asking for the identities of union organizers.

WE WILL NOT tell employees that they would not need a union with us as we were going to pay salaries high enough for them to make a living, while we, at the same time, reduce the staff.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer all the employees listed below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered due to the discrimination against them, plus interest.

Eva Lewis	Mary Diane Banks
Susie Moore	Karen McAllister
Ennis McAllister	Brenda Washington
Mabel Hatton	Linda Washington
Nevada Holloman	Janet Lynn Parker
Gloria Marshall	Linda Thomas
Loretta Jackson	McCarol Moore

WE WILL restore the *status quo ante* as to all changes in the terms and conditions of employment which we made without bargaining with the Union, including employee transfers and shift changes, layoffs, or reduction of hours; also including policy on vacations, lunches, breaks, insurance policies, uniforms, and sick leave. However, we will continue to pay premiums on any and all employee accident and health insurance policies.

WE WILL recognize and bargain with the Union on any proposed changes in the terms and conditions of employment and with respect to reaching an agreement on a collective-bargaining agreement.

MAGNOLIA MANOR NURSING HOME, INC.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me in Marshall, Texas, on September 9–13, 1980,[1] pursuant to an order consolidating cases, complaint and notice of hearing issued by the Regional Director for Region 16 of the National Labor Relations Board on July 9, and which is based on charges filed by Service Employees International Union, Local 706, AFL-CIO (herein called the Union), on June 9 (Case 16-CA-9185) and on June 10 (Case 16-CA-9119). The complaint alleges that Magnolia Manor Nursing Home, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act).

The Issues Presented

1. Whether Respondent is engaged in a business affecting interstate commerce to a degree that the Board has jurisdiction.

2. Whether Respondent is a successor employer and, if so, whether Respondent violated the Act by making unilateral changes in the terms and conditions of employment.

3. Whether Respondent, by and through its agent, Kenneth Jewell, violated the Act by the making of certain statements to employees which statements were calculated to coerce said employees in the exercise of their rights protected by Section 7 of the Act.

4. Whether Respondent violated the Act by refusing to hire certain persons employed by the nursing home's

[1] All dates herein refer to 1980 unless otherwise indicated.

former owner and by terminating other persons shortly after Respondent hired them.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.[2]

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent denies that it is subject to the jurisdiction of the National Labor Relations Board. However, the evidence of record shows that Respondent is a Texas corporation operating a nursing home facility in Jefferson, Texas. In addition, it was stipulated at the hearing that Respondent would project its gross revenues during any consecutive 12-month period to be in excess of $100,000. Evidence also shows that Respondent has or will purchase goods and materials valued in excess of $5,000 for a representative 2-month period from a supplier located within the State of Texas, which supplier has made purchases and received goods valued in excess of $50,000 per year from outside the State of Texas. Finally, Respondent has or will directly purchase and receive medical supplies from outside the State of Texas valued at approximately $3,000 per year. Accordingly, I find, that Respondent is a health care institution within the meaning of Section 2(14) of the Act and is engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.[3]

II. THE LABOR ORGANIZATION INVOLVED

Respondent denies, but I find, that Service Employees International Union, Local 706, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.[4]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

On or about April 30, Kenneth Jewell purchased the Magnolia Manor Nursing Home (hereinafter nursing home) from Mr. and Mrs. James Cole. Jewell's interest in purchasing the Cole's business dated from 1977 when Jewell first became aware of its existence while investigating the possible purchase of another nursing home located in the same town, Jefferson, Texas. Because the Coles were involved in unexplained litigation, the nursing home was not available for sale in 1977. However, Jewell contacted the Coles periodically until finally he was told in early 1980 that the litigation had been completed and the business was for sale.

In August 1979, the Union was contacted by certain of the Coles' employees who expressed an interest in organizing a union. An organizing campaign was begun and the requisite amount of interest was expressed by the employees. In October 1979, the Board conducted a representation case (R case) hearing for about 4 days, during which time several employees testified. Some of these employee witnesses noticed Jewell in attendance at the hearing, accompanied by one or more of his children. On or about January 18, the Board conducted an election which the Union won 36 to 7. On or about January 18, the Board certified the Union as a representative of an appropriate unit described as:

> All full and regular part-time employees employed at the Employer's . . . location, including LVN/charge nurses and other nursing service employees, housekeeping, dietary, medical records clerk and social activities director. [G.C. Exh. 14.]

On March 24, Union Official Val Cox testified that he sent a letter to Clarice O'Brien, administrator of the nursing home under both the Coles and under Kenneth Jewell, notifying her that employees Garner, Thomas, and Hatton were to be chief steward, shift steward, and executive board member, respectively. Thereafter, the Coles retained attorney Hugh Smith, who began negotiating a contract with the Union on behalf of the Coles.

While the Coles were negotiating with the Union, they were also negotiating with Jewell to buy the nursing home. In mid-April, the deal was made and about 2 weeks later closed. Jewell purchased the home for $500,000 with $100,000 down; the ownership interest was divided evenly between Jewell and his two children.

At the time of the purchase, Jewell owned three other nursing homes in the same general area of East Texas. These homes were all nonunion and no union had attempted to organize them. Jewell had been in the nursing home business since 1974 and before that had been a machinist for the preceding 18 years, the first 11 of which were spent as an employee and the last 7 of which were spent as an employer.

Cox learned of the sale to Jewell on April 30 when he was called by attorney Smith. Cox then sent three telegrams; one to Smith, asking to bargain on the effects of the sale on employees,[5] and the other two to Jewell. One was a request for recognition and bargaining over conditions of employment based on the Union's status as

---

[2] The General Counsel's brief was not received by me until November 14. This was a duplicate copy of the original mailed by her on November 6, but never received before the November 10 due date. I will treat this brief as timely filed.

[3] *University Nursing Home*, 168 NLRB 263 (1967); *Drexel Home, Inc.*, 182 NLRB 1045 (1970).

[4] In making this finding, I rely on the evidence of record, including the testimony of Union Official Val Cox, which I have credited and including the "Certification of Representative," which I admitted over Respondent's objection. This latter document (G.C. Exh. 14) is dated January 18, 1980, and reflects that the Union was certified as the bargaining representative of an appropriate unit described in "The Facts" portion of this opinion. See also *Alto Plastics Manufacturing Corporation*, 136 NLRB 850, 851-852 (1962).

[5] In addition to the two charges filed in this case, Cox also filed a charge against the Coles for refusal to negotiate on the effects of the sale on unit members. The Board issued a complaint which was resolved by an informal settlement.

a certified bargaining agent (G.C. Exh. 16); the other telegram of the same date sent to Jewell asked specifically for the continued employment of all unit employees. (G.C. Exh. 15.)

2. Respondent as an employer

On April 30, Jewell called a meeting of nursing home employees for midafternoon. The employees within the bargaining unit were almost all blacks,[6] making the minimum wage, and, in some cases, had several year's seniority. Jewell arrived for his first meeting with his employees with an entourage of approximately 15 employees from one of his other nursing homes. As Jewell addressed Respondent's employees, his other employees milled about in plain view behind him.

Jewell began the meeting by introducing himself, members of his family who were nominal coowners of Respondent, and the other persons present who worked for Jewell at one of his other nursing homes. This latter group included nurses, nurse aides, and a cook. After introductions, Jewell said that he knew there had been some problems with the Coles, but that he wanted to start fresh with them. That is, Jewell said:

> I knew they had tried to form a union, and that there hadn't been a contract or anything, the Coles told me there was no contract, and they didn't have a union, and that's where I stood at the time. I thought that until a contract was signed and everybody agreed that they had a union, they didn't have a union, but I found out they did. And I said, "With me you won't need that. I am going to give the salaries that it takes to make you a living, but I can't work this many people and do that. Neither could the Coles."

Jewell went on to say that these employees could either work for him and get along with him or they could leave right then. He also told them that, if they wanted to run a building, they should go get $100,000 together and buy one.

Besides indicating to employees that, in his view, Respondent was overstaffed, Jewell also announced certain specific changes he intended to make. First, he would not allow any vacations accrued under the Coles and his employees would be entitled to a week's vacation only after they had worked for him for 1 year. The Coles had permitted 2 weeks after 1 year. (Resp. Exh. 6.) Second, the Coles permitted two 15-minute breaks per day, Jewell would permit one. Third, the Coles provided for free lunches prepared in the nursing home kitchen, while Jewell stated he could not afford this and all employees would be required to bring their own lunch. Fourth, the Coles did not require employees to wear uniforms, but Jewell announced he would. He also stated he would provide 10-cent-per-hour uniform allowance.[7] Finally, Jewell stated that employees would be required to take individual accident and health policies at their own expense.[8] Jewell explained that he carried no workmen's compensation insurance at any of his nursing homes and, while he understood he was ultimately responsible for any work-related injury or illness, he felt the insurance plan would lessen his potential exposure to employee claims. The record does not reflect whether the Coles carried workmen's compensation insurance, but it is clear that many of the Coles' employees hired by Jewell either never had the accident and health insurance or had permitted it to lapse.

Jewell announced no further changes in terms and conditions of employment, but in subsequent days he did make two relevant changes in working conditions, although I am not sure if the second was meant to cover all employees. First, Jewell converted a patient room used under the Coles as a patient activity room and an employee break room back to a patient room. The nursing home had been licensed as a 60-bed home under both the Coles and Jewell, but the former generally had fewer than 58 patients. Jewell wished to have the maximum number of patients permitted under his license. Under both owners, however, the number of patients varied between 54–58 under the Coles and between 56–60 under Jewell. Second, Jewell discharged employee Ennis McAllister in part for being absent on a Saturday. Jewell testified that he could not tolerate absences on Saturday for any reason.[9] No such policy existed under the Coles. (Resp. Exh. 5.)

Subsequent to this meeting, Jewell, together with his daughter Gayla Jewell and O'Brien, began to interview applicants. Approximately 54 employees had worked under the Coles. Of these, Susie Moore, an LVN, and two sisters named Washington, nurses aides, were among those not hired by Jewell. However, not all people hired were interviewed; in fact, some hired did not even submit applications. All unit employees hired were paid the same as they earned under the Coles. In addition, in all or most cases, employees were hired to perform the same work for Jewell as they had done under the Coles.

The unit employees who testified were employed generally in either the medical, the kitchen, or the housekeeping and maintenance groups, although there was some overlap. I begin with the medical group which was divided into licensed vocational nurses, nurses aides, and medical aides. One of the LVNs under the Coles was Susie Moore, who worked the 11 p.m.–7 a.m. shift. Moore had worked for the nursing home since May 1977. Moore was 61 years old and had a moderate hearing disability. When she was interviewed by Jewell on

[6] To a limited extent, the race of participants in this case is intertwined with the issues of labor law herein presented. Accordingly, when relevant, race will be noticed in this case.

[7] This change in working conditions was never implemented—neither the wearing of uniforms nor the uniform allowance. Jewell testified that Cox told him he could not make these changes without negotiating with the Union. To this, Jewell responded, "Let's just forget the whole matter."

[8] Again Jewell changes his mind on this matter. On or about June 5, Jewell told those employees still working for him that he would pay the premium of $8 a month per employee. At this time, a violent and almost fatal incident occurred as a result of a dispute over the insurance as reflected in greater detail below.

[9] Jewell also fired Karen McAllister, a nurses aide on the 11 p.m.–7 a.m. shift as she was calling in sick on May 6. McAllister was informing Debbie Brown, director of nurses, that she would not be in that evening when Jewell interrupted the call saying, "Thank you for your service. You've been replaced and we no longer need you"; then he hung up.

May 1, he told her that he no longer intended to have an LVN on the 11-7 shift. Jewell offered her a position at one of his other nursing homes, but she said that she could not afford to move. Then Jewell instructed Moore to return the next day when he would discuss the matter further with her. Before Moore came back, Jewell testified he received certain information from various sources leading him to believe that Moore abused patients. I will examine the sources and nature of the information provided in the "Analysis and Conclusion" section of this opinion. For now, it suffices to say that Jewell refused to hire Moore when she returned the next day and this refusal constitutes a major issue in the case. With the exception of the two Washington sisters and some others, the remaining unit members in the medical group began work. Then on June 5, several of them stopped working as a result of a bizarre incident involving Johnetta Johnson, a long-term nurses aide at the nursing home. Like the prior incident, I will discuss the matter in detail below. Much of it is sharply disputed by the participants, witnesses, and bystanders. Briefly, the matter involved an argument between Johnson and Jewell over the former's refusal to apply for and accept an accident and health policy, even after Jewell had agreed to pay the premiums himself. This intense dispute culminated in Jewell discharging a handgun in the hall of the nursing home. No one was injured as a result of this episode.

In the kitchen, Jewell first attempted to retain all employees while at the same time clearly indicating his intention to reduce the staff, restructure work shifts, and redistribute work assignments as soon as possible. The kitchen employees responded to these initiatives in a fairly uniform way. All quit or so indicated their resistance to Jewell's plans that they were fired. Kitchen Supervisor Doris Norris, who did not testify, quit first. Because Jewell was required to have a licensed supervisor in charge of the kitchen, Jewell asked remaining employees whether they would be willing to undertake the necessary schooling and training. For various reasons, all declined.

Finally, I turn to the housekeeping department. The supervisor there was Mary Diane Banks, who began employment in November 1978. She was hired by Jewell on April 30, then fired by him on May 1. A detailed description of the circumstances surrounding Banks' discharge is necessary only if I find that Banks is not a statutory supervisor, a sharply contested issue. I will discuss this and related matters in the "Analysis and Conclusion" section of this opinion. Replacing Banks as housekeeping supervisor was Janet Lynn Parker, who began working at the nursing home in April 1979. She quit her job on May 8 because she was unable to perform heavy janitor's work assigned to her by Jewell. Parker was replaced by Maxine Williams who began employment on May 20 and was still employed at the nursing home at the time of hearing. Other than Ron Banks, husband to Mary Banks, the only other member of this department to testify was Ennis McAllister, who had worked at the nursing home about 1 year before he was fired by Jewell on May 3, in part for calling in sick on a Saturday. As the original housekeeping staff was depleted, Jewell attempted to assign employees from other departments into housekeeping. Generally, these efforts were unsuccessful.

The original charge in this case was filed by the Union on May 6. (G.C. Exh. 1(a).) A few days later, Jewell sent out a host of letters to his former employees offering them reemployment at the nursing home. Some letters were sent to incorrect addresses or were otherwise delayed in reaching the addressee. In other cases, former employees responded, but were faced either by a lack of Respondent interest or the same difficulty which had led to their departure originally. In any event, only one former employee, Loretta Jackson, was rehired as a result of these letters.[10]

While all of the above events were occurring, Jewell had several contacts with Cox relative to his representation of unit employees. After the two telegrams referred to above, Cox talked to Jewell over the phone on May 2. The former asked for a meeting but Jewell said he was too busy then. There is some conflict in the testimony as to whether a meeting was scheduled for May 5, but both Jewell and Cox agree that they did in fact meet on that day at the nursing home.

Cox argued that Jewell should be laying off people on a seniority basis and only after negotiating with the Union. The two men discussed Moore in particular and Jewell told Cox he would never take her back as she had abused patients. Cox also asked to bargain on the wearing of uniforms and the uniform allowance. This meeting was followed by a May 9 letter from Cox to Jewell asking the latter to reinstate employees and make them whole. Cox also requested that Jewell refrain from any further actions affecting employees without negotiating with the Union. (G.C. Exh. 9.) The two men met again on June 2 and this time Jewell was accompanied by his attorney, McLaughlin. Cox gave McLaughlin a copy of certain proposals that had been tentatively negotiated with attorney Hugh Smith while the Coles owned the nursing home. McLaughlin stated that he would study these proposals, but that Jewell would never agree to arbitration nor to checkoff. Another meeting was scheduled for July 7, but was postponed for 1 week due to a business commitment which Cox had elsewhere. This meeting was ultimately canceled at the request of McLaughlin due to the Board having issued a complaint in the case. (G.C. Exh. 8.)

B. *Analysis and Conclusions*

1. Is Respondent a successor employer?

On or about April 30, Respondent purchased the nursing home from the Coles. Thereafter, the location of the business and the equipment used stayed the same; the nature of the business, the number and identity of patients, and the level of care and funding for their care remained the same. In addition, the administrator of the nursing home, Clarice O'Brien, continued her position under Respondent. Initially, lower ranking supervisors also remained the same: Doris Norris, dietary supervisor,

[10] As a result of a hearing before a U.S. District Judge in August, Jewell again agreed to offer reemployment to many of his former employees and this time several accepted

Banks, housekeeping supervisor, and Debbie Brown, director of nurses. When Jewell took over operation of the nursing home, there was no hiatus in the operation of the business. Finally, Jewell hired most of the Coles' employees except for, among others, Susie Moore and the two Washington sisters. There is, therefore, a substantial continuity of the employing industry.[11] I therefore find that Respondent is a successor employer.[12]

Counsel for Respondent admits that Respondent is likely to be found a successor under *Burns, supra*, but then contends that Jewell had no obligation to bargain over the initial terms and conditions of employment, which were substantially different from those maintained by the Coles. In support of its position, Respondent cited the *Burns* case and another case *N.L.R.B.* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (6th Cir. 1972), to which I now turn.

In *Burns*, the Court held that a successor was not obligated as a matter of law to assume the preexisting collective-bargaining agreement between the union and the seller. Here no such issue exists as the Coles never negotiated a contract with the Union. The Court also said in *Burns* at 294–295:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

This so-called *Burns* exception has been interpreted by the Board in an important case which inexplicably is not cited by either party. In *Spruce Up Corporation*, 209 NLRB 194–195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), the Board stated:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one. . . . Many of the former employees here did not desire to be employed by the new employer under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

At the April 30 meeting, Jewell announced new terms and conditions of employment to the nursing home employees respecting vacations, lunches, uniforms, breaks, and insurance. Under the authority cited above, he was free to change the terms and conditions of employment without violating the Act.[13] However, I find that Jewell violated the Act under a different theory.

In my view, Jewell violated the Act in refusing to recognize the Union and to bargain over the changes in the terms and conditions of employment, because he was motivated by union animus in announcing and implementing these changes. Beginning with his statements at the April 30 meeting relative to the Union and the pattern of antiunion statements and acts which I find below, Jewell desired a turnover of staff for the purpose of reducing support for the Union. However, he desired these changes gradually and only as he found persons to replace those not retained or retained and then actually or constructively discharged. Jewell also fabricated various pretexts to justify his desired staff turnover and this took time as well.

Approximately 52–54 persons were employed under the Coles, including supervisors and part-time employees. Of these, Jewell hired approximately 45 persons by May 1 or shortly thereafter. This constituted his entire initial work force. Among those former employees not hired by Jewell were Susie Moore and Brenda and Linda Washington. With respect to Barbara Hatton and Christy Jarrett, they were never called as witnesses and therefore it cannot be established with certainty whether they worked for Jewell or not. With respect to McCarol Moore, I find contrary to Respondent's assertion that she was constructively hired by Jewell when she reported for work on May 1, without initial objection by Jewell.

At the April 30 meeting, Jewell told employees in part that: "I wanted to start with them. I wanted to start fresh with them. I wanted them to work there." These statements in the context of Jewell's reduction of benefits and other harsh words at the meeting must have confused employees and made them uncertain of their position with the new owner. When these statements are interpreted in light of what was to come, their false promise is made clear. Jewell went on to testify that he required those employees who worked under the Coles to fill out applications with references which would be checked and then submit to interviews. There is no evidence that any references were checked. Nor was there evidence that all employees hired filled out applications nor that they were all interviewed. In addition, those employees who were retained were in almost all cases told to continue doing the job they had done under the Coles. This is evidence that Jewell desired to retain the Coles' employees only until he had replacements and a pretext to fire them or not to retain them.

Thus, I find that Jewell's unilateral changes in terms and conditions of employment constituted a violation of Section 8(a)(5) of the Act under the circumstances herein present. This conclusion is based not on the so-called "*Burns* exception," which is not applicable here, but on

[11] *Saks & Company d/b/a Saks Fifth Avenue*, 247 NLRB 1047 (1980); compare *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980).

[12] *N.L.R.B.* v. *William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Valmac Industries, Inc.* v. *N.L.R.B.*, 599 F.2d 246 (8th Cir. 1979).

[13] See *Bellingham Frozen Foods, Inc.* v. *N.L.R.B.*, 626 F.2d 674 (9th Cir. 1980).

my finding that these changes were motivated by Respondent's antiunion intentions to reduce support for the Union in the bargaining unit. Despite Jewell's efforts, the previously certified appropriate unit continued under Jewell, a fact which supports Jewell's duty to bargain over initial terms and conditions of employment. Other facts in support of my conclusion follow.[14]

I begin with Jewell's denial of knowledge of the Union's relationship to the nursing home unit employees. Jewell argues that he had no knowledge of the union certification prior to April 30 and only learned of this as of May 5. He claims that he was advised by the Coles that, since no contract had been signed with the Union, there was no union and no obligations to the Union. I find this claim preposterous and disbelieve it *in toto*. Jewell owned three other nursing homes and wanted to buy a fourth. In the course of attempting to buy Respondent, his interest extended over a year's time. He even attended the R case hearing for about an hour. Based on this alone, I would be inclined to discredit his testimony. However, I will also credit the testimony of current employee Lillie Crowe, a nurses aide. She testified that, on May 2, she had a conversation with Jewell at the nursing home, wherein she asked Jewell, whether he knew before he bought the nursing home that the employees were unionized. He admitted to her that he was aware that the employees were unionized. It should be pointed out that Crowe did not tell the National Labor Relations Board investigator about this statement. However, I credit her testimony and discredit Jewell's denial of the statement primarily because it makes no sense at all to me that Jewell did not know and because I have generally judged Jewell's credibility to be low in this case. Also, I thought that Crowe was a sincere and truthful witness. I will discuss the credibility issue further in finding below that Jewell violated Section 8(a)(1) of the Act on several occasions.

I will also discredit Jewell's denial that he received telegrams from Cox sent on April 30 at 11:46 a.m. (G.C. Exhs. 15 and 16) informing Jewell that the Union was the bargaining agent for the employees. Even though the telegrams were sent to Jewell at one of his other nursing homes, the confirmation copies were received into evidence and I do not believe Jewell when he says he never received them.

Although I discredit Jewell's testimony when he said he did not know about the Union nor his obligations under the Act, I do accept Jewell's account, in part, of his remarks at the April 30 meeting to show animus toward the Union. Jewell said that he knew the employees had tried to form a union, but also said that, because they did not have a contract, they did not have a union. He also stated, "With me you won't need that [a union]. I am going to give the salaries that it takes to make you a living, but I can't work this many people and do that." Then, with the 15 employees of his other nursing homes standing behind him, Jewell said that the employees "could either work for him and get along or they could leave right then." He said, "If [you] want to run a building, [you] should buy one, get $100,000 together and find one."

The thinly veiled attacks on the Union made by Jewell and the promulgation of erroneous labor law (i.e., no contract, no union) all convince me that Jewell was motivated in changing the initial terms and conditions of employment by antiunion bias and the hope that the Union supporters would quit.[15] Those that did not would gradually be replaced as I discussed above. In *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, fn. 8 (1974), the Court made clear that a successor employer could not refuse to retain nor to hire employees of the predecessor because of antiunion considerations.

In sum, I find that Jewell was playing for time. Along with the remarks made at the April 30 meeting which I reported above, Jewell also stated there were too many employees and some would be terminated shortly. By changing the terms and conditions of employment due to a hostility toward the Union, he would be able to erode the power of the Union, and hope that some employees would elect not to work for him and replace the others when he found suitable replacements. Accordingly, I will recommend that Respondent be required to recognize the Union, to rescind its changes in the terms and conditions of employment, and to return its employees to the *status quo ante*; I will further recommend that Respondent be ordered to bargain with the Union on these proposed changes. I will further recommend that Jewell be ordered to bargain with the Union on the issue of a collective-bargaining agreement.

2. Did Jewell interrogate, threaten, and otherwise coerce employees in the exercise of their Section 7 rights?

In part, the question posed is affirmatively answered by the evidence recited thus far.[16] In part, the question posed is affirmatively answered by the evidence to follow below. I begin, however, with a special discussion of Jewell's credibility in order to justify my discrediting of much of his testimony. First, Jewell was an angry person, blaming in his testimony various persons and entities for the predicament in which he found himself:

(1) The Coles for overstaffing and for allegedly giving him wrong information on the status of the Union; (2) Union Official Cox for trying to run the nursing home, for trying to tell Jewell what to pay employees, for trying to run Jewell off like he did the Coles, for fooling Jewell into believing that Cox was representing him in the dispute with employees, and for having overall responsibility for the labor dispute which led to the hearing; and (3) the National Labor Relations Board for pre-

[14] It is important to note the lack of evidence as well. No credible evidence was introduced to show that the nursing home was in fact financially distressed nor that it was overstaffed. Also, no attempt was made to justify any of the changes in vacation policy, lunches, etc. Accordingly, to the extent that Respondent's position can be construed as an economic defense, it is unsupported by the record and I reject it.

[15] I find that these remarks were calculated to coerce employees in the exercise of their Sec. 7 rights and therefore violated Sec. 8(a)(1) of the Act.

[16] The Board is entitled to consider emphatic antiunion attitudes as "background" against which to measure the impact on employees of management's statements and conduct. *Independent, Inc., d/b/a The Daily Advertiser* v. *N.L.R.B.*, 406 F.2d 203, 205, fn. 1 (5th Cir. 1969).

tending to be a fair organization. This "passing the buck" detracted significantly from Jewell's credibility. In addition, Jewell appeared to have a low opinion of women. On May 4, Jewell fired Ennis McAllister in part for being sick on a Saturday and, in part, according to McAllister's testimony, because "he didn't like the idea of having a man around the nursing home anyway, because if a man walks out, the women will follow." Jewell also made certain remarks suggesting a racial bias, as he believed the blacks on the day shift were the most responsible for the Union.[17] This is what Jewell told Crowe and I credit her testimony over his denial of the remark. Jewell also blamed the day shift for the Union without the reference to race in statements to employees Ennis McAllister, a janitor, Nevada Holloman, a cook, and Janet Parker, a housekeeper.

Thus, I resolve the credibility issue against Jewell for several reasons: First, his hostile and suspicious attitude toward unions, the Board, women, and blacks detracted from the believability of his testimony; moreover, some of his testimony was inherently incredible as discussed above. Second, the sheer volume of testimony against him, most of it consistent, corroborative, and unimpeached, is persuasive; in addition, Jewell himself has provided some corroboration, in particular his testimony relative to his April 30 remarks to employees about the Union; and, finally, the General Counsel's witnesses, for the most part, impressed me as sincere and truthful witnesses who would not be given to fabrication.

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, *tends to interfere with the free exercise of the* employee rights under the Act."[18] Moreover, I find that the statements attributed to Jewell as described both above and below were part of an overall pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights.[19] In finding several violations of Section 8(a)(1), I note first that Jewell was obviously a high-level supervisor with the demonstrated power to hire and fire employees. Next, the Board has recently held that interrogation of employees in order to probe their union sentiments or knowledge of union activities is unlawful, even in the absence of threats of reprisals or promises of benefits.[20] Moreover, Jewell never gave any assurances against reprisals,[21] and, in some cases, did make threats of reprisals.

Specifically, I credit the following testimony and thereby find Respondent violated Section 8(a)(1):

(1) *Surveillance of union activities, impression of surveillance, and coercion*: On May 5, Jewell asked Parker, McAllister, and Jarrett whether they were going to a union meeting. In fact, a union meeting had been scheduled for that evening. Jewell told these employees that anyone attending these meetings would not have a job on return and that he had ways of determining who attended. On another occasion, Jewell told employees Crowe and Tucker that anyone attending a union meeting would be fired. I also find that O'Brien told Crowe not to let Jewell find out that Crowe had attended a union meeting.[22]

(2) *Coercion*: On or about May 2 to Thomas, and May 7 to Parker, Jewell stated that he would pay a $100,000 fine before he would permit the Union in.[23]

(3) *Interrogation*: On May 7 and 8, respectively, Jewell asked employees Parker and Marshall on separate occasions for the names of people who organized the Union and he also told Parker that whoever gave him the information would benefit.[24]

(4) *Coercion*: On May 2, 6, and 7, respectively, Jewell told employees Thomas, Taylor, and Parker on different occasions that, if he were able to remove 50 percent of the union supporters, he would be able to win the election. Jewell also told Parker that there would always be something wrong around the nursing home which he could blame on an employee he wanted to fire.[25]

(5) *Futility of union support*: On May 2 and 3, respectively, Jewell told employees Holloman and Tucker on different occasions that the Union was not going to tell him what to pay employees nor how he should run the nursing home.[26]

In conclusion, I note that the complaint alleges approximately 24 instances of statements made by Jewell or other agents of Respondent. Those discussed above and two others to follow are the principal violations. It is unnecessary to rule on other alleged violations since they are cumulative to those already decided and would not affect the remedy in this case.[27]

---

[17] The element of race is mentioned only insofar as it appears to be relevant to the labor issues contained herein. Compare *N.L.R.B.* v. *Houston Distribution Services, Inc.*, 573 F.2d 260, 265 (5th Cir. 1978). Certain black witnesses who formerly worked for Jewell testified to statements which Jewell made to them and which they believed to be racist. E.g., at the initial employment interview, Jewell told Janet Parker, a housekeeping employee, that "each of his employees would take a bath and he didn't want to smell me."; he told Lillie Crowe, a nurses aide, not to bring a bag to work, because she might steal a ham or roast on the way home; he told employee Linda Thomas, who had just stated that she could not work 3 p.m. to 11 p.m. shift due to a young child at home, "You people don't want to work." Despite the resentment of these witnesses to the tenor of these remarks, I have concluded that they are generally credible witnesses. While I find that Jewell made the remarks attributed to him by the above witnesses, I have not discredited him as a witness solely because he made those remarks. However, I find in the context of this case that they reflect on his general credibility. Cf. *Douglas & Lomason Company*, 253 NLRB 277 (1980).

[18] *Electrical Fittings Corporation, a subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975).

[19] *Pennypower Shopping News, Inc.*, 253 NLRB 85, fn. 4 (1980).

[20] *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980); *Centre Engineering, Inc.*, 253 NLRB 419 (1980).

[21] *N.L.R.B.* v. *Cement Transport, Inc.*, 490 F.2d 1024, 1028 (6th Cir. 1974), cert. denied 419 U.S. 828.

[22] *Ohio City Manufacturing, Inc.*, 238 NLRB 965 (1978). O'Brien testified she could not recall making the statement, but her testimony was not persuasive.

[23] *Skrl Die Casting, Inc.*, 245 NLRB 1041 (1979); *Westinghouse Electric Corporation*, 240 NLRB 905 (1979).

[24] *Osco Drug, Inc., a wholly owned subsidiary of Jewel Food Companies, Inc.*, 237 NLRB 231 (1978); *Smith Auto Service, Incorporation*, 252 NLRB 610 (1980).

[25] *Centre Engineering, Inc., supra*, 253 NLRB 419. I regard this statement as highly persuasive of Jewell's unlawful motive in refusing to recognize and bargain with the Union and in discharging or failing to retain certain of his predecessor's employees.

[26] *Marathon Metallic Building Company*, 224 NLRB 121, 124 (1976); *The Trane Company (Clarksville Manufacturing Division)*, 137 NLRB 1506, 1510 (1962).

[27] See *Agricom Oilseeds, Inc.*, 245 NLRB 616 (1979).

3. Were any or all of Respondent's employees discharged because of their union activities or other protected concerted activities?

I find that, with the exception of Johnson, Crowe, Tucker, and Della Washington, all other employees who were not retained, who were retained and then fired, or who were retained and then quit are entitled to reinstatement and to be made whole. I will find that the quits were in fact constructive discharges. I state below my reasoning in each individual case. However, all employees were members of and supporters of the Union. The particular circumstances of each case are judged in light of this fact and other evidence heretofore recited.

a. *Mary Diane Banks*

Banks started working at the nursing home in November 1978, was hired by Jewell on April 30, and was discharged on May 1.

(1) Was Banks a statutory supervisor?[28]

About 3 months after Banks started employment under the Coles, Banks was made "head housekeeper" by O'Brien. At this time about 10 percent of her duties changed. Although Banks had a title of "housekeeping supervisor" and even referred to herself in those terms, I must conclude that she was not a statutory supervisor. It is a worker's actual powers and duties and not his or her title which controls.[29] Banks had only the routine control of a skilled worker over less capable employees, rather than the control of a supervisor sharing the power of management.[30] Thus, at the employment interview with Jewell, Banks was asked only if she could operate a buffer and she said she could. Apparently no one else on the housekeeping staff was qualified to operate this machine. However, the routine nature of Bank's job is clear from the time she became the head of housekeeping under the Coles. This is important because Jewell told her to continue doing what she had been doing before.

First, before and after she became a supervisor, Banks' job was to clean the patients' rooms, hallways, bathrooms, dining room, and lobby. This work was of a routine nature since there was little change in the identity, the condition, or the number of patients on a day-by-day basis. Also, both before and after her promotion, Banks was paid on an hourly basis, punched a timeclock, and spent most of her day doing the routine work described above.[31] Any special instructions were relayed to her by O'Brien.

O'Brien prepared a job description for Banks shortly after Banks became a supervisor.[32] (C.P. Exh. 5.) Banks' job description was identical to that received by the others. When she received the job description, there were a total of seven employees in the housekeeping department including three part-time janitors. Like them, Banks worked 4 days on and 2 days off. When she was off, no one performed her exact duties as "supervisor." Banks received no special benefits as a result of her status other than a 15-cent-per-hour salary differential; others made $3.10 and she made $3.25. She earned the same vacation time as the other employees.

The indicia of Bank's supervisory authority which I find to be of a routine nature included ordering supplies on a regular basis, some every week, and some every 2 weeks. Any orders of an extraordinary nature had to be cleared with O'Brien. Banks never signed sales orders nor arranged for payments to be made. Banks was told to watch other employees and make sure they did their job. This involved little effort since all knew what to do and did it. On several occasions, Banks recommended to O'Brien that friends be hired and they were hired. Other employees also recommended that friends be hired. There is no evidence that Bank's recommendations were treated differently than those made by other employees. On two occasions she reported employees were not doing their job. O'Brien decided to discharge them. Banks also made daily assignments and schedules, but these changed very little on a day-to-day basis. If someone were sick, Banks would try to get a replacement, or might come in herself if she were off, to cover for the missing employee. Anyone getting sick while at work or needing time off for other purposes would have to see O'Brien for permission. On the basis of this entire record, I conclude that Banks' position was comparable to a nonsupervisory leadman because at most she exercised limited or sporadic supervisory authority.[33] Banks exercised little or no independent judgment.[34]

In conclusion, the evidence in this case should be compared to that in *Dunkirk Motor Inn, Inc., d/b/a Holiday Inn of Dunkirk-Fredonia*, 211 NLRB 461 (1974), enforcement denied 524 F.2d 663, 665-667 (2d Cir. 1975), where an assistant housekeeper in a motel was found to be a statutory supervisor. There the supervisor was salaried, directly supervised the work of the maids under her, personally took disciplinary action when required, attended management meetings, and replaced the housekeeper when the latter was off. Because the duties of Banks are substantially different, I must conclude that the *Dunkirk* case does not apply.[35]

---

[28] This issue existed during the representation hearing in the case. Initially the housekeeping supervisor was excluded from the unit. The Union filed an appeal of that determination and in a telegram dated January 8, the Board ruled in pertinent part that "a substantial issue is raised concerning the supervisory status of Diane Banks."

The Board went on to rule that she should be permitted to cast a vote under challenge. (G.C. Exh. 18.) However, since the Union won the election 36 to 7, her vote was never counted and no decision was made on her supervisory status at that time.

[29] *Berry Schools* v. *N.L.R.B.*, 653 F.2d 966 (5th Cir. 1980). Put differently, a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with "a title and theoretical power to perform one or more of the enumerated functions." *N.L.R.B.* v. *Southern Bleaching and Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

[30] *Goldies, Inc.* v. *N.L.R.B.*, 628 F.2d 706 (1st Cir. 1980).

[31] *Maremont Corporation*, 239 NLRB 240 (1978).

[32] I credit Banks' testimony that she received this document after becoming supervisor over O'Brien's less-than-certain testimony that the document was prepared before.

[33] *J. J. Newberry Company, a Wholly Owned Subsidiary of McCrory Corporation*, 249 NLRB 991, 991-992 (1980).

[34] *Goldies, Inc.* v. *N.L.R.B.*, *supra*.

[35] In *Red Oaks Nursing Home, Inc.* v. *N.L.R.B.*, 633 F.2d 503 (7th Cir. 1980), an assistant food supervisor with duties similar to Banks' was found not to be a supervisor. See also *Quik-Pik Food Stores, Inc.*, 252 NLRB 506 (1980).

(2) Was Banks fired in violation of the Act?

Having found Banks an employee, I now conclude that she was discharged in violation of Section 8(a)(3) of the Act. I will view the facts of her case as well as those of other employees in light of the record evidence described thus far. Banks was discharged by Jewell on May 1, after having worked for about 3 hours. This happened after witness Debbie Williams, an employee of Jewell at another nursing home, allegedly overheard, on April 30, Banks telling employees Parker and McAllister to walk out on Jewell to protest the new working conditions. Williams testified she immediately went to a co-worker of hers named Faye Royal, and told her what Williams said she heard. Then both women reported the remark to Gayla Jewell, daughter of Kenneth Jewell and part owner of Respondent. Gayla then reported the remark to her father who fired Banks the next day. Banks denied making the remarks at issue, but did testify she said something to Parker about now knowing if she would stay, because of Jewell's new policy on vacations. Banks made the same remark to O'Brien later. Both Parker and McAllister denied hearing remarks attributed to Banks by Williams. Moreover, Parker and McAllister testified that Banks was attempting to calm their fears about Jewell and encouraged them to give Jewell a chance.

In analyzing this case, I first credit Banks' denial of the remarks attributed to her. I find that Williams was mistaken in what she thought Banks said. Although Williams was a management trainee, she never went to Banks to clarify her alleged remarks. Jewell never went to Williams nor did he ask for Banks to explain. He did ask if she had anything to say after he fired her and Banks remained silent. I credit her explanation for saying nothing:

> Well, I figure when somebody tells you that, "you're fired" or "I have to let you go" I figured there was no need for me to say anything else, or anything.

After crediting Banks' version of events, I also find that, even if Banks had attempted to organize a walkout in protest of Jewell's policy, this would have been protected concerted activity. Thus, Jewell's mistaken belief that Banks was engaged in protected concerted activity as a basis for firing her is a violation of Section 8(a)(1) and (3) of the Act.[36] In addition, it is no defense that Jewell considered Banks to be a supervisor when I find her to be an employee.[37] I will recommend that she be reinstated and made whole.

Alternatively, if Banks is found on review to be a statutory supervisor, I nevertheless find that she is entitled to reinstatement and to be made whole. Since I have found a widespread pattern of misconduct against employees and supervisors alike, the restoration of the *status quo ante* is required to fully dissipate the coercive effects, because I find that her discharge, even as a supervisor, violates Section 8(a)(1) of the Act.[38]

b. *Susie Moore*

This employee was interviewed by Jewell, but never hired. He first told her that her job as a licensed vocational nurse (LVN) on the 11 p.m.-7 a.m. shift was being abolished. Of course, this is a matter on which Jewell was required to negotiate with the Union. Jewell offered Moore a job at another of his nursing homes, but she stated she could not leave the area. Then Jewell told her to return the next day for further discussion. Before Moore returned, Jewell claimed to have learned that Moore abused patients. First, there was an alleged report of such in her file under the Coles. However, sometime after the charge was filed in this case, but before hearing, Mrs. Cole retrieved all her personnel files and the alleged report on Moore was returned to Mrs. Cole. Cox saw the document once and it did not say what Jewell represented it said. O'Brien also described the alleged incident and said there had been a complaint not of abuse, but of inattention to a patient's needs. Moore had denied the accusation of wrongdoing and O'Brien clearly did not consider the matter.

Next, Jewell claimed a relative of a patient told him that Moore talks "bad" to patients. Jewell could not recall the name of the patient. Finally, Jewell's daughter Gayla reported to Jewell that some relatives of a patient had complained to her that Moore abused patients. I regard all of the evidence regarding Moore as purely pretextual. No report of Moore's alleged mistreatment of patients either by Jewell, O'Brien, or anyone else was made to the State of Texas, although a state law requires that an immediate report be made where there is evidence of patient abuse. In addition, personal physicians examine patients on a regular basis and no physician reported evidence of patient abuse. Gayla Jewell saw bruises on the arm of one patient alleged to have been mistreated, but on cross-examination, it was established that the patient's limb had been amputated for medical reasons.

In sum, during the approximately 3 years that Moore had worked at the nursing home, there was no convincing proof that she had not been a satisfactory employee. In *Americana Health Care Corporation of Ohio d/b/a Barberton Manor*, 252 NLRB 380 (1980), the Board affirmed the decision of the Administrative Law Judge finding pretextual that an employee was discharged for alleged patient abuse. The real reason there as here was Respondent's desire to divest itself as soon as possible of all union supporters, particularly where a pretext was available.

c. *Brenda Washington and Linda Washington*

These women had been employed as nurses aides at the nursing home for 4 years prior to Jewell taking con-

[36] *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427 (1978).

[37] *Orr Iron, Inc.*, 207 NLRB 863 (1973), enfd. 508 F.2d 1305 (7th Cir. 1975); *New Castle Lumber and Supply Co., Division of Peter Kuntz Co.*, 199 NLRB 685 (1972).

[38] *Pennypower Shopping News, Inc.*, 253 NLRB 85, fn. 4 (1980); *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980); *Sheraton Puerto Rico Corp. d/b/a Puerto Rico Sheraton Hotel*, 248 NLRB 867 (1980).

trol. When they were interviewed by Jewell on May 1, he told them that he was overstaffed and could not use them for that reason and because they lived too far away and did not have a telephone of their own. Then Jewell told them, "I'll give you a week to work." To this, Brenda Washington responded that it was unfair for them not to be hired. At this point, Jewell withdrew his offer, saying they could leave right then.

First, there were several employees of Jewell's, including O'Brien and Donna McClellan, an RN, who lived further away from work than the Washingtons. Next, the telephone issue had not been a problem for 4 years before Jewell, and there was no evidence why it should suddenly become a problem. Next, there was no legitimate way for Jewell to know on May 1 that he would be overstaffed since he could not possibly know how many of the Coles' employees would desire to work for him. In the context of these reasons and other evidence of Jewell's discriminatory motivation already stated, I must find that by failing to hire these women Jewell violated Section 8(a)(3) of the Act. In addition, Jewell was required to negotiate with the Union on the issue of which employees, if any, should be laid off for legitimate economic reasons.

d. *Janet Lynn Parker*

This employee worked as a housekeeper, having been hired originally in April 1979. After Banks was fired, she was put in charge of the housekeeping department. However, Parker did not make schedules nor order supplies and her pay remained the same. Consequently, I find the evidence even stronger as to Parker that she was not a statutory supervisor. Parker stopped working on May 7 when she talked to Jewell on the telephone. She had been doing heavy janitor work formerly done by a man. She also had been working in the kitchen for part of the day. Jewell told her that this was only temporary until he could find someone to replace McAllister, who had been terminated. On May 7, Parker told Jewell that she could not continue to do this work, which was too heavy. Jewell first told her she did not have to be in charge of housekeeping, but she responded that due to recent surgery and the recent birth of a baby she simply could not do the janitor's work. He responded that she would toughen up to it and either do the janitor's work or stay at home.

I find that Parker was constructively discharged in violation of the Act. For constructive discharge, it is necessary to have intolerable changes in working conditions; motivation to discourage union membership and support, and an employee's resignation prompted by these changes.[39] The record amply demonstrates Respondent's antiunion motivation, particularly in the course of several statements made to this employee which I have found violated the Act. The intolerable conditions consist of the heavy work which Parker was unable to do and which no woman had been asked to do before.[40]

e. *Linda Thomas*

This employee began working at the nursing home in November 1975 as an LVN. In her interview with Jewell, on April 30, he told her that he preferred registered nurses and when he found one he would let her go. On May 11, Jewell told her that he had found an RN but said she could finish out the day. A few days prior to this, Jewell had called her into his office and told her that various employers from the area had been calling him, wanting to know who the union organizers were.[41] Jewell then told her she would never get another job, but he was willing to offer her 2 days a week on the 3-11 shift. Thomas had been working 4 days a week on the 7-3 shift. Thomas told Jewell that she had to care for her 3-year-old son at home, and could not work that shift.

I find that Thomas was constructively discharged. To begin, replacing Thomas with an RN was one less member in the bargaining unit and one less union supporter. Jewell's offer for Thomas to work 50 percent less than what she had been working at a different shift was no offer at all. While an employer has no duty to accommodate special personal needs of its employees, here Jewell's motivation was clearly expressed by certain statements made to Thomas recounted above and intolerable working conditions created in order to force her to quit.[42]

f. *McCarol Moore*

Moore began at the nursing home in January 1979. She was a cook on the 5-1 shift. On April 30, Moore filled out an application but was never interviewed, at least not formally, in Jewell's office. She did meet and talk to Jewell on May 1 when he came into the kitchen. He told Moore and the other kitchen employees that too many were employed there and he asked Moore to work a split shift—6:30 to 9 and 4 to 7. Like the last employee, Moore stated she could not work that shift due to a young child at home. Then Jewell told her to just work out her 4 days, which she did.

I find that Moore was constructively discharged. Jewell was not authorized to change unilaterally Moore's shift.[43] In addition, I rely on the substantial evidence of unlawful motive already recited.

g. *Karen McAllister and Ennis McAllister*

Both these employees were fired by Jewell on May 3 after calling in sick on one occasion. Ennis was told that Jewell would not tolerate any employee calling in sick on a Saturday. Neither employee was told of Jewell's alleged policy on sick leave prior to the time they were

[39] *Haberman Construction Company*, 236 NLRB 79 (1978), enfd. 618 F.2d 298 (5th Cir. 1980); *Cartwright Hardware Company* v. *N.L.R.B.*, 600 F.2d 268, 270 (10th Cir. 1979).

[40] *Monroe Auto Equipment Company*, 159 NLRB 613, 622-625 (1966), enfd. 392 F.2d 559 (1968).

[41] I find that these statements were coercive and violated Sec. 8(a)(1) of the Act.

[42] *Daniel Construction Company a Division of Daniel International Corp.*, 244 NLRB 704 (1979).

[43] *Electric Machinery Company*, 243 NLRB 239 (1979).

fired.[44] Moreover, such a policy never existed under the Coles. I find that both terminations were pretextual and made for the purpose of reducing support for the Union.[45]

h. *Mabel Hatton*

Hatton had worked at the nursing home as a cook for 16–17 years before Jewell's arrival. Jewell told her of his expected reorganization of the kitchen on May 1. On May 2 and 3, she was off. During this time, Jewell called her husband and told him that he would not need her anymore because he had heard that she did not want to work. On May 3, Jewell called her back and asked her to come in to work only as a 1-day replacement for another cook. She accepted only if she could return to her job, but Jewell refused this.

Again I find that her discharge was pretextual and made in violation of the Act due to her support for the Union. There was no evidence to support Jewell's belief that she did not want to work.

i. *Nevada Holloman*

Another longtime cook at the nursing home, Holloman never made out an application nor submitted to formal interview by Jewell. She spoke with him on May 2 in the kitchen where she was working her usual 5–1 shift. When Holloman indicated she would not be able to wash pots and pans after breakfast and lunch, as well as cook those meals as Jewell had ordered, Jewell said, "You can work the rest of the day if you want to, but if it was me, I'd leave right now."

I find that Holloman was fired by Jewell for refusing to accept a unilateral change in her working conditions. Her discharge was unlawful as Jewell was obligated to bargain on the change. Moreover, I find that his expressed desire for efficiency in the kitchen was pretextual.

j. *Gloria Marshall*

Marshall worked at the nursing home about 3 years as an evening cook before Jewell took over. She submitted an application, but was never interviewed. On May 8, Jewell told her that she was being switched to the 6–2 shift in the kitchen. She objected, saying she had small children at home. To this, Jewell responded that she just wanted to sleep late in the morning. Then Jewell said there would be no job in the nursing home for her and she would have to go to Houston for work. Jewell also told her she could work 2 days on and 4 days off. On May 15, Jewell offered to employ her for 2 days on an a.m. shift and 2 days on a p.m. shift, but she quit. I find that Marshall was constructively discharged for refusing to accept a unilateral change in her working conditions.

k. *Loretta Jackson*

This employee worked as a cook on the 11–7 shift. She submitted an application, but was not formally interviewed. On May 2, Jewell told her that she would be working from 6–1 with an hour break and then work 2–7 p.m. Not surprisingly, Jackson said that she could not do that work, because it was too hard, too long, and she would not get her proper rest. Jewell then told her to either work or leave, but she agreed to work until noon, after being asked to do so by a kitchen supervisor.

I find that Jackson was constructively discharged. Not only was her shift unilaterally changed, but her hours were lengthened and her job made more difficult. This was done to force her to quit due to her support for the Union.[46]

l. *Johnetta Johnson*

Johnson started at the nursing home in January 1971. She was hired by Jewell as a nurses aide, the same job she had before. On June 5, she was fired by Jewell. On that day, Johnson and her daughter, also an employee at the nursing home, were driven to work by her husband, a retired person, in time for a 2 p.m. meeting. Johnson knew as she came to work that she would refuse to enroll in an accident and health insurance plan arranged for by Jewell and costing $8 per month. Before the meeting formally began, she told Jewell that she did not want the insurance as she could not afford it. Jewell told her and later announced to the assembled employees that he had decided to pay the premiums for this coverage. Jewell also said that because these employees had been with him for over 30 days, Jewell knew they were on his side and that they could work together.[47] Johnson, however, refused to take the insurance even if Jewell paid the premium. She testified that she was afraid he would discontinue his payments and she would have to pay. Indeed, Jewell did remark to the assembly that, once employees received raises in pay, he would discontinue these payments. Accordingly, during the employees' meeting, Johnson continued to object to the insurance. As Jewell began to distribute employee paychecks, Johnson also objected to his failure to provide a check stub with pertinent salary deductions listed as employees had received under the Coles. Finally, Jewell warned Johnson that, if she continued to protest both matters, he would have to fire her. She continued arguing with Jewell in a loud and disruptive voice. Finally, Jewell told her she was fired. Then Jewell handed employee paychecks to another employee for distribution and left the room. All agree that he was followed by Johnson who, having received her paycheck then due, was de-

[44] The Board has held that unexplained changes in an employer's disciplinary system implies a discriminatory motive. *Keller Manufacturing Company Inc.*, 237 NLRB 712 (1978). This assumes for the sake of argument that Jewell's policy on sick leave was bona fide; a very doubtful assumption.

[45] *General Battery Corporation*, 241 NLRB 1166 (1979); *Louisiana Council No. 17, AFSCME, AFL–CIO*, 250 NLRB 880 (1980).

[46] Cf. *J. P. Stevens and Company*, 461 F.2d 490, 494 (4th Cir. 1972); *Seven-Up Bottling Company of Bridgeton, New Jersey, Inc.*, 235 NLRB 745 (1978).

[47] I find that the timing of this benefit, Jewell's explanation of it, and the entire circumstances of this case are a violation of Sec. 8(a)(1) even though it was not expressly made dependent on the employees' rejection of the Union. *Grandee Beer Distributors, Inc.* v. *N.L.R.B.*, 630 F.2d 928 (2d Cir. 1980). Jewell's offer indicated a coercive purpose and intent, i.e., to undermine support for the Union in a subsequent election. See *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964).

manding a second check for the last few days that she had worked. This check was not due for another week and Jewell refused to make special arrangements for Johnson.

There is a sharp conflict about subsequent events. Jewell testified that, as he was walking to his office followed by Johnson, her husband approached from another direction. He had his hand in his pocket and acted in a threatening manner. Jewell testified that he removed a hand weapon from his clothing and warned Johnson and her husband to back off. At this point, Mr. Johnson allegedly stated that he was going to get his weapon. Jewell shouted at Mrs. Johnson, "I'll shoot you" three times. Finally, the gun discharged but only by accident. The insurance agent on the scene and one other employee corroborate Jewell's account to the extent that they saw Mr. Johnson near Jewell just before the gun was fired. Mrs. Johnson denies that Mr. Johnson was in the nursing home at the time of the incident and several employees testified that they did not see him there. According to Mrs. Johnson, Jewell aimed and fired the gun in an attempt to shoot her, because she demanded her final check.

I find that Mr. Johnson was in the nursing home at the time as described by Jewell. Mr. Johnson was never called as a witness and I rely on an adverse inference as his absence was never explained.[48] In addition, the General Counsel's witnesses on this point were not necessarily in a position to see Mr. Johnson at the time in question. Paychecks were being distributed and there was confusion in the meeting room. I reject Johnson's testimony that Jewell attempted to shoot her as incredible. I find the firing of the shot to have been purely accidental and I find the exhibiting of the gun was a response to a perceived threat. This, of course, is not to condone Jewell's use of the gun. He testified that he had begun to carry it as his life had been threatened by a disgruntled former employee before this incident.

After this incident occurred, Mrs. Johnson reported the matter to police and signed a complaint against Jewell. He was not arrested, but was required to report to the police station to make bail. At the time of hearing, no action had been taken on the complaint.

Mandatory insurance coverage was a new term and condition of employment instituted by Jewell, although there had been some insurance coverage under the Coles. Before Jewell announced that he would pay the premium, four other employees besides Johnson had indicated they would refuse coverage. Then all but Johnson accepted the insurance coverage. Since Jewell fired Johnson, there is no issue as to constructive discharge. Nor can I find any pretextual reasons for the discharge. By June 5, Jewell had caused several employees to leave, and the record indicates to me no motivation for him to discharge other employees—indeed he was in the midst of awarding them a benefit—which I have found to be unlawful. With due deference for Johnson's long service and fully considering the context of Jewell's other unlawful behavior, I can find no basis to hold that Jewell violated the Act in discharging Johnson. Even if it be said that Jewell initially provoked the matter by unilaterally changing the insurance coverage and even if Jewell were unreasonable in not allowing Johnson to opt out of the program, I cannot find the critical and essential element of unlawful motivation in this incident. Here the element of timing works in favor of Jewell.[49] Moreover, Johnson's action subsequent to her discharge of demanding her final paycheck and acting in such a way as to make Jewell believe he was threatened are consistent with my view that Johnson had the greater share of the responsibility for the incident. I discredit Johnson's testimony that she wanted her final check so that she would not have any further contact with Jewell. No reason was suggested why the check could not be mailed nor why she could not receive the check from her daughter, who worked at the nursing home. As to Mr. Johnson, I do not find that he appeared pursuant to any plan nor do I even hold Mrs. Johnson responsible for the actions of her husband. Rather I find that Mr. Johnson's actions reinforce my belief that Jewell did not violate the Act in the firing of Mrs. Johnson.

m. *Lillie Crowe, Acie Tucker, Della Washington, and Joann Taylor*

These employees all quit their jobs on June 5, immediately after the gun was fired by Jewell. I find that none of these women were constructively discharged. Johnson had the greater responsibility for the incident, and the firing of the gun was an accident. Jewell was not discriminatorily motivated to discharge these employees. None of them left in response to the changed terms and conditions of employment. Respondent did not violate the Act with respect to their separation from employment.

n. *Barbara Hatton and Jo Alice Scott*

These persons were not called as witnesses and I lack any credible evidence on which to make findings. Accordingly, I will recommend that they be dismissed from the case and that they be entitled to no relief.

o. *Other individuals*

The General Counsel's motion to strike from the complaint certain individuals made at the close of the hearing is hereby granted and the following persons are hereby struck: Roy Dean Albertson, Ronnie Banks, Mabel Hunter, Ella James, Christie Jarret, Dorothy Johnson, Eva Lewis, and Danny McAllister.

In conclusion, I note that, after the charges in this case had been filed, Jewell sent out several letters to employees between May 12 and 19. (See G.C. Exhs. 10 and 11.) These letters offered former employees a job at the nursing home. Respondent has objected to characterizing these letters as offering reinstatement and it is not necessary to rule on how they may be properly characterized. The issues presented by these letters and other offers of employment which occurred, about 3 months later pursuant to a proceeding before a U.S. District Judge, are

[48] *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 (1977).

[49] Moreover, I also cannot find any concerted action by Johnson. It is clear to me that she acted as an individual. See *Anco Insulations, Inc.*, 247 NLRB 612, 612-613 (1979).

matters to be resolved in the compliance portion of these proceedings as may be necessary.

CONCLUSIONS OF LAW

1. Magnolia Manor Nursing Home, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local 706, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent is a successor employer to Magnolia Manor Nursing Home.

4. The Union is the certified bargaining representative of all full and regular part-time employees employed at Respondent's Jefferson, Texas location, including LVN/charge nurses and other nursing service employees, housekeeping, dietary, medical records clerk and social activities director.

5. Respondent violated Section 8(a)(5) by failing to recognize and bargain with the Union and by unilaterally changing the terms and conditions of employment of its employees for the purpose of undermining support of the Union; more specifically, Respondent changed its predecessor's policies as to vacations, lunches, uniforms, breaks, and insurance coverage without consulting or bargaining with the Union due to union animus.

6. Respondent also violated Section 8(a)(1) of the Act:

(a) By surveilling union activities, giving the impression of surveillance, and threatening the jobs of employees who attended union meetings.

(b) By telling certain employees that he would pay a $100,000 fine before he would permit the Union in.

(c) By interrogating employees about the identity of union organizers and telling an employee whoever provided the information would benefit.

(d) By telling employees that, if he were able to remove 50 percent of the union supporters, he would be able to win the next election; and by telling an employee that he could always find some legitimate reason to fire an employee.

(e) By telling certain employees that he would not let the Union tell him what to pay employees, nor how he should run the nursing home.

(f) By telling employees that with him they would not need a union, that he was going to give the salaries it takes for employees to make a living, but that he could not work this many people and do that, and by telling employees that because they did not have a contract they did not have a union.

(g) By telling employees that because they had been with him for over 30 days, Jewell knew they were on his side and that they could work together, and then stating he would pay an insurance premium of $8 per month which up to that time employees had been expected to pay.

(h) By telling employee Thomas that various employers from the area had been calling him and asking who the union organizers were.

7. Respondent also violated Section 8(a)(1) and (3) of the Act by discharging or failing to retain the following named employees for the purpose of undermining support for the Union: (a) Mary Diane Banks, a nonsupervisory employee; alternatively, even if found to be a supervisor, her discharge violated the Act; (b) Susie Moore; (c) Brenda Washington; (d) Linda Washington; (e) Janet Lynn Parker; (f) Linda Thomas; (g) McCarol Moore; (h) Karen McAllister; (i) Ennis McAllister; (j) Mabel Hatton; (k) Nevada Holloman; (l) Gloria Marshall; and (m) Loretta Jackson.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Except as specifically found herein, Respondent engaged in no other unlawful conduct.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act and to post an appropriate notice attached hereto as "Appendix B."

Also, it is recommended that Respondent reinstate and make whole all former employees listed in "Appendix A," for any loss of pay as a result of the discrimination against them. Said backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716 (1962).

Upon the foregoing findings of fact, the conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[50]

The Respondent, Magnolia Manor Nursing Home, Inc., Jefferson, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Surveilling union activities and giving the impression of surveillance.

(b) Coercively interrogating employees about union activities and identities of union activists.

(c) Threatening to discharge employees for attending union meetings or for other protected concerted activities.

(d) Implying that it would not bargain with the Union over wages or over the terms and conditions of employment.

(e) Coercively telling employees that a legitimate reason for discharge could always be fabricated and for making other similar types of antiunion statements.

(f) Discharging employees or failing to retain other employees for the purpose of undermining support for the Union.

(g) Offering benefits to employees such as payment of insurance premiums for the purpose of undermining support for the Union.

[50] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(h) Telling employees that other employers in the area had been calling and asking for the identities of union organizers.

(i) Telling employees that they would not need a union with him as he was going to pay salaries high enough for them to make a living, while at the same time reducing the staff.

(j) Telling employees that, because they did not have a contract, they did not have a union or other erroneous statements of labor law.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.[51]

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Reinstate and make whole all former employees listed in "Appendix A" in the manner set forth in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Expunge and remove from its records and files, the documents dealing with the unlawful terminations or failure to retain, all former employees listed in Appendix A.

(d) Restore the *status quo ante* as to any changes in the terms and conditions of employment made by Respondent without bargaining, including employee transfers and shift changes, layoffs, or reduction of hours; also including policy on vacations, lunches, breaks, insurance policies, uniforms, and sick leave. However, Respondent should continue to pay premiums on any and all employee accident and health insurance policies.

(e) Recognize and bargain with the Union on any proposed changes in the terms and conditions of employment and with respect to reaching agreement on a collective-bargaining agreement.

(f) Post at its Jefferson, Texas, facility copies of the attached notice marked "Appendix B."[52] Copies of said notice, on forms furnished by the Regional Director for Region 16, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

[51] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[52] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Mary Diane Banks	Susie Moore
Brenda Washington	Linda Washington
Janet Lynn Parker	Linda Thomas
McCarol Moore	Karen McAllister
Ennis McAllister	Mabel Hatton
Nevada Holloman	Gloria Marshall
Loretta Jackson	